JOHN T. FEY

No. 585

In the Supreme Court of the United States

OCTOBER TERM, 1957

THEODORE C. BONNEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 3a–52a) [1] are reported at 24 T. C. 199.[2] The opinion of the Court of Appeals (Pet. 15–18) is reported at 247 F. 2d 237.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1957. The petition for a writ of cer-

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[1] Record references are to the Appendix to the taxpayer's brief in the Court of Appeals.

[2] This case was consolidated with several other cases in the Tax Court, and the Tax Court's opinion is reported *sub nom. Samuel Towers, et al.* v. *Commissioner.* However, Bonney took a separate appeal to the Court of Appeals for the Second Circuit, and his case was severed for purposes of appeal.

tiorari was filed on October 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the courts below, sustaining the Commissioner's denial of a deduction for theft loss, properly concluded that taxpayer's proof failed to establish the elements of a theft under the governing (New York) local law.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> * * * * *
>
> (3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.* * *
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 23.)

STATEMENT

The material facts, as found by the Tax Court (R. 40a–42a) and as stated by the Court of Appeals (Pet. 17), may be summarized as follows:

Taxpayer married Edna Wheaton in Syracuse, New York, on August 19, 1937. From that date until

April 1945, they lived together as man and wife. (R. 40a; Pet. 17.)

Edna had been previously married (on June 6, 1921) and divorced (in March 1922). The decree of divorce prohibited her from remarrying in New York State without a special decree from the Supreme Court of that State. (R. 40a–41a; Pet. 17.) No decree permitting remarriage was obtained.

At the time of his marriage to Edna, taxpayer did not know she had been married previously or that she had been divorced and prohibited from remarrying. After he learned the facts, in 1945, taxpayer separated from Edna and commenced an action in the Supreme Court of New York for an annulment. He obtained a judgment in 1947 declaring that the marriage was void *ab initio*. (R. 41a; Pet. 17.)

Taxpayer claimed deductions in his 1945 income tax return for monies given to Edna for clothing and spending money in the years 1937–1945, when they lived together as man and wife. (R. 41a–42a; Pet. 17.) [3]

The Tax Court upheld the Commissioner's disallowance of the claimed deductions (R. 42a–45a), and the Court of Appeals affirmed (Pet. 17–18).

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[3] Taxpayer also states (Pet. 6–7) that he spent $13,000 to rebuild a house on a farm which he deeded to himself and Edna as tenants by the entirety. He apparently claims a portion of this $13,000 as an additional deduction in 1945, although in the courts below this amount was claimed as a theft loss in 1947, when he deeded his interest in the farm to Edna. (R. 47a; Pet. 18.)

ARGUMENT

Relying upon Section 23 (e) (3) of the Internal Revenue Code of 1939 (*supra*, p. 2), taxpayer is claiming deductions, on the ground of theft, for clothing and spending money he gave Edna Wheaton during their putative marriage. The alleged theft is that of larceny by false pretenses under Section 1290 of the New York Penal Law. In considering whether Edna committed that offense, the court below recognized that a failure on the part of a prospective spouse to disclose a prior marriage, which disables that party from contracting the projected marriage, renders the marriage void *ab initio* (*Roth* v. *Roth*, 97 Misc. 136, 161 N. Y. S. 99), and that it also supports an action for damages, which may include amounts laid out for support of the putative wife during the supposed marriage (*Kujek* v. *Goldman*, 150 N. Y. 176, 44 N. E. 773; *Amsterdam* v. *Amsterdam*, 56 N. Y. S. 2d 19). But, as the court below stated (Pet. 17), to constitute the crime of larceny by false pretenses under New York law, there must be proof of criminal intent to deprive and defraud the owner of his property. *People* v. *Lehrer*, 182 Misc. 645, 45 N. Y. S. 2d 170. Although taxpayer had the burden of showing by "clear and convincing proof" that New York law supported his contention of theft (*Helvering* v. *Fitch*, 309 U. S. 149, 156; *Helvering* v. *Leonard*, 310 U. S. 80, 86), petitioner offered "no evidence" of the requisite criminal intent. (R. 44a.) Nor, as the court below stated (Pet. 18), did he cite any case holding that the necessary criminal intent is to be inferred merely from a ceremonial marriage con-

tracted by a disqualified spouse. The court below properly concluded that the Tax Court was warranted in finding that taxpayer had not sustained his burden of proof.

Indeed, it seems unlikely that any New York court would find Edna guilty of theft in the circumstances of this case, in view of the normal presumption of innocence (*People* v. *Barker*, 153 N. Y. 111, 47 N. E. 31; 9 Wigmore on Evidence (3d ed.), Section 2497), and the established policy of the courts and legislature (see *Gaines* v. *Jacobsen*, 308 N. Y. 218, 124 N. E. 2d 290) to treat even a bigamous marriage as valid for many purposes during its continuance. For example, a woman who has gone through a ceremonial marriage, subsequently declared void because she was not free to marry, may now recover alimony in New York even though she was not blameless. *Johnson* v. *Johnson*, 295 N. Y. 477, 68 N. E. 2d 499; *Gaines* v. *Jacobsen, supra; Bonney* v. *Bonney*, 65 N. Y. S. 2d 488, affirmed, 271 App. Div. 1060, 70 N. Y. S. 2d 133; New York Civ. Prac. Act, Sec. 1140 (a).

The decisive holding that taxpayer failed to establish the elements of a theft under New York law is correct. In no event does that holding present a question of importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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